STATE OF CONNECTICUT

SUPREME COURT

S.C. 19797

LYME LAND CONSERVATION TRUST, INC.

VS.

BEVERLY PLATNER

REPLY BRIEF OF THE DEFENDANT-APPELLANT

TO BE ARGUED BY:

BRENDON P. LEVESQUE OR
KAREN L. DOWD

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INTRODUCTION

This case boils down to a difference of opinion regarding the aesthetics of the defendant's property. The defendant wants the area to be a lawn integrated into her unrestricted property. The Lyme Land Conservation Trust, Inc. ("Land Trust") wants the area to be a field. Although not prohibited by the Declaration, the lawn offended the Land Trust's sensibilities. But it is the Declaration's language, *not* the Land Trust's sensibilities, that governs the defendant's conduct. The lawn specifically, and the defendant's actions generally with respect to the property, are well within her rights under the Declaration.

The Attorney General concedes, as he must, that the Reservations control over the Restrictions. (A.G. Br., 3).[1] Specifically, he acknowledges that, "[t]he clear intent of the Reservations is to allow the reserved conduct in the Protected Area notwithstanding its prohibition by the Restrictions." (A.G. Br., 3). The Attorney General then tries to reconcile the Reservations and Restrictions to support the trial court's erroneous interpretation of the Declaration. In the end, he is unable to complete that Herculean task because it is impossible to reconcile the Declaration, properly interpreted, with the trial court's decision.

On the other hand, the Land Trust follows the same improper path the trial court took. They both rely on the Restrictions to limit the Reservations, and to judge the defendant's conduct on her property. Such an interpretation unreasonably reads the Reservations out of the Declaration.

REPLY ARGUMENT

I. THE DECLARATION IS CLEAR.

The interpretation of the Declaration by the trial court and the Land Trust is flawed for several significant reasons.[2] First, it perpetuates the trial court's improper interpretation of the

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[1]Because the plaintiff Land Trust and the Attorney General, as intervening plaintiff, both filed briefs in this matter, the Attorney General's brief will hereafter be referred to as "A.G. Br." and the Land Trust's brief will be referred to as "L.T. Br."

[2]The Land Trust relies on General Statutes § 52-560a to demonstrate the intent of the Declaration, which was signed in 1981. (L.T. Br., 5). General Statutes § 52-560a was codified

Declaration by reading the Restrictions in isolation. Second, it does not begin where it should, with the language of the Reservations. Finally, it ignores the actual language of the Declaration.

In claiming that the defendant violated the Declaration, the Land Trust relies only on the Restrictions contained therein. But there is no dispute that under the canons of construction all of the relevant text in an agreement must be considered. Since the days of the Marshall Court, it has been well recognized that "a fair construction of the whole instrument" is necessary when interpreting legal texts. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). Legal texts should be construed "'as a whole ... so as to reconcile all parts as far as possible.' (Internal quotation marks omitted.)." *Brown and Brown, Inc. v. Blumenthal*, 297 Conn. 710, 734 (2010) (citing *West Haven v. Hartford Ins. Co.*, 221 Conn. 149, 157 (1992)).

In addition, all parts of a legal document should be construed "in a manner that gives effect to both, eschewing an interpretation that would render either ineffective." *Rainforest Cafe, Inc. v. Dep't of Revenue Services*, 293 Conn. 363, 377-78 (2009) (quoting *State v. Ledbetter*, 240 Conn. 317, 336 (1997)). Finally, "if possible, the component parts of a statute should be construed harmoniously in order to render an overall reasonable interpretation...." *Astoria Federal Mortg. Corp. v. Genesis Ltd. P'ship*, 167 Conn. App. 183 (2016) (citing *Bd. of Ed. of Town of Hamden v. State Bd. of Ed.*, 278 Conn. 326, 333-34 (2006)). As with other canons of construction, this principle applies to all legal texts.

A. The Declaration must be read as a whole.

The Land Trust mistakenly interprets the Restrictions as independent, controlling provisions. In Section C of its first argument, which details the defendant's alleged "Violations of the Provisions of the Declaration," it does not once mention the Reservations. It claims that

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for the first time in 2006. The Land Trust also claims that the interpretation of this document will be "perforce, a construction of . . . C.G.S. § 47-42a." (L.T. Br., p. 4). This case, however, is purely about the construction of the Declaration. A judicial determination of the Declaration's meaning has no corollary effect on the construction of General Statutes.

the defendant violated Restrictions 1.1, 1.2, 1.3, 1.4, 1.6, and 1.7. (L.T. Br., 11-22). This myopic interpretation fails to take into account that the Restrictions are limited by the Reservations.

For instance, the Land Trust claims that the defendant violated Restrictions 1.3 and 1.4 of the Declaration by installing "Ornamental Flower and Plant Beds in the Field."[3] (L.T. Br., 16). However, its interpretation contradicts the express terms of the Declaration when those Restrictions are read in conjunction with Reservations 2.2 and 2.5. Paragraph 2.2 reserves the defendant's right "[t]o conduct and engage in the cultivation and harvesting of crops, flowers, and hay; the planting of trees and shrubs and the mowing of grass; the grazing of livestock; and the construction and maintenance of the fences necessary in connection therewith."[4] (Def. App., A215). Paragraph 2.5 also reserves the defendant's right "[t]o continue the use of the Protected Areas for all purposes not inconsistent with the restrictions set forth in ARTICLE I above." In fact, even if the Reservations did not take precedence, it is undeniable upon reading the Declaration that the installation of shrubs and mowing is permitted.

The Land Trust's interpretation renders many of the Reservations inoperative. For example, Restriction 1.4 would cancel out Reservations 2.2 and 2.3,[5] Restriction 1.1 would

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[3]1.3 No soil, loam, peat, sand, gravel, rock, mineral substance, or other earth product or material shall be excavated or removed [from the Protected Areas].
1.4 No trees, grasses or other vegetation thereon shall be cleared or otherwise destroyed. (Def. App., A214)

[4]The Land Trust points out that the defendant admitted that she does not harvest her flowers, necessarily tying cultivating and harvesting together absolutely because of the term "and." But read as a whole in conjunction with the rest of the sentence, such a reading would require that the defendant must cultivate and harvest "crops, flowers, *and* hay," that is, all three or none at all. Further, when planting trees, the defendant would also have to plant shrubs or she would be violating the Declaration. Such a reading is nonsensical.

[5]1.4 No trees, grasses or other vegetation thereon shall be cleared or otherwise destroyed. (Def. App., A214).
2.2 To conduct and engage in the cultivation and harvesting of crops, flowers and hay; the planting of trees and shrubs and the mowing of grass; the grazing of livestock; and the construction and maintenance of fences necessary in connection therewith.
2.3 The cultivation and harvesting of forest products in accordance with sound non-commercial forestry practices. (Def. App., A215)

cancel out Reservation 2.4,[6] and Restrictions 1.5 and 1.6 could prevent the defendant from carrying out Reservations 2.1 and 2.4.[7] The Declaration cannot be read so as to render portions of it meaningless.

B. The Reservations are the starting point of a proper analysis.

A proper analysis of the Declaration begins with the language of the document. The logical starting point is contained in the preamble to Section II Reservations: "*Anything in ARTICLE I above to the contrary notwithstanding*, the Grantor reserves to himself and his heirs and assigns the following rights in and upon the Protected Area:" (Def. App., A215) (emphasis added). As the Attorney General conceded, the Reservations represent a broad grant of authority. Under the terms of the Declaration, the defendant can do all of the things specifically enumerated in paragraphs 2.1 through 2.5. (Def. App., A215). The Restrictions were express limitations as to what could not occur on the property, to be read in conjunction with the overriding reservations of rights to use the property.

C. "Or" versus "And"

The plaintiffs selectively cite words and phrases and then apply them out of context. For example, they both rely on the trial court's statement that the defendant's actions "caused great

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[6] 1.1 No building, sign, outdoor advertising display, mobile home, utility pole or other temporary or permanent structure will be constructed, placed or permitted to remain upon the Protected Areas. (Def. App., A214)

2.4 To maintain, repair, reconstruct and replace any utility poles and associated appurtenances thereto located upon the Protected Areas at the effective date hereof. (Def. App., A215).

[7] 1.5 No activities or uses shall be conducted thereon which are detrimental to drainage, flood control, water conservation, erosion control, soil conservation, fish and wildlife or habitat preservation.

1.6 No snowmobiles, dune buggies, motorcycles, all-terrain vehicles or other vehicles of any kind shall be operated thereon. (Def. App., A215).

2.1 To create and maintain views and sight lines from residential property of the Grantor by the selective cutting, pruning or trimming of vegetation, provided that such action shall not have a significant adverse impact upon the Protected Areas.

2.4 To maintain, repair, reconstruct and replace any utility poles and associated appurtenances thereto located upon the Protected Areas at the effective date hereof. (Def. App., A215).

damage to the protected area's natural condition" which the defendant was obligated to retain. (L.T. Br., 1) (A.G. Br., 6, 9). But the Declaration did not require the defendant to retain "the natural condition" of the property. The root of this error is a failure to read the document as a whole. There is no overarching provision that requires the reserved area to remain in a "natural condition." In fact, the stated purpose of the declaration is to "assure retention of the premises predominantly in their natural, scenic *or* open condition and in agricultural, farming, forest and open space use and to assure competent, conscientious and effective preservation and management in such condition and use." (Def. App., A216) (emphasis added). The property was to be kept in a natural condition, a scenic condition *or* an open condition, or perhaps a combination. But nowhere does the document require that the property be kept *only* in a natural condition.

In order to sustain their interpretation, the plaintiffs both rewrite the purpose to read, "natural, scenic [and] open condition . . ." Immediately after quoting the correct language, the Land Trust explains that "compliance with such restrictions would necessarily preserve the Restricted Area in the same natural, scenic *and* open condition it was in at the time of the grant of the Declaration." (L.T. Br., 7) (emphasis in original); (cf. A.G. Br., 10-11, 13, 15). The Land Trust consistently construes this phrase in the same manner throughout the rest of its brief.

Reading the Declaration in the disjunctive, to protect the natural, scenic *or* open condition of the property, is consistent with the Reservations and the Restrictions of the Declaration. The owner may plant trees (natural but not open), may graze livestock (open but not necessarily scenic), and may cultivate crops such as corn (not necessarily scenic or open). The use of the conjunctive "and" in the Declaration requires all three items, natural, scenic *and* open, whereas the disjunctive "or" requires at least one, natural, scenic *or* open. The conjunctive interpretation is untenable for three reasons. First, it is *not* what the actual language of the agreement says. Second, the words "and" and "or" have two distinct meanings. Third, reading "or" to mean "and" necessarily writes out the Reservations section of the Declaration.

It is absurd to torture the meaning of the word "or" to mean "and" as to do so would cancel out another section of the agreement. As Justice Scalia explains, this "close look at the authoritative language of legal instruments – as well as the litigation that has arisen over them – shows that these little words can cause subtle interpretive problems." Reading Law: The Interpretation of Legal Texts, Antonin Scalia and Bryan Garner (2012). In this case, it would be impossible to retain the land in its natural, scenic *and* open condition while simultaneously engaging in tree farming, a permitted activity under the Reservations and the express Restrictions.[8] Indeed, this example nicely demonstrates the flawed emphasis on all three adjectives in limiting activities. Clearly the Land Trust does not perceive the "manicured landscape" to be scenic, while the defendant does, but it certainly is open. Absent a reading of "or" as "and," the Land Trust's interpretation and the trial court's decision cannot be upheld.

The Attorney General claims that interpreting the "or" as a disjunctive "or" rather than a conjunctive "and" "would lead to an absurd result." (A.G. Br., 11). As an example, the Attorney General posits that a disjunctive "or" in this case would allow for the construction of a parking lot. This argument is without merit. The Restrictions prohibit "...sand, gravel, rock or other mineral substance..." from being placed, being stored or remaining in the Restricted Area. (Def. App., A214). Asphalt, the substance used to pave parking lots, is composed of sand, gravel, rock, or other mineral substance. The Attorney General can cite to no Reservation which supersedes that express Restriction to allow construction of a parking lot. Accordingly, as written, the Declaration precludes the installation of an asphalt parking lot.

D. *NPC* supports the Defendant.

The plaintiffs' reliance on *NPC Offices, LLC v. Kowaleski*, 320 Conn. 519 (2016) is flawed. (L.T. Br., 2, 5, 6). The Attorney General cites *NPC* to support his claim that the Declaration should be interpreted consistently with public policy. He writes, "[I]f the language in the

[8] 2.2 To conduct and engage in the cultivation and harvesting of crops, flowers and hay; the planting of trees and shrubs and the mowing of grass; the grazing of livestock; and the construction and maintenance of fences necessary in connection therewith. (Def. App., A215).

Declaration is subject to two reasonable interpretations, the Court should interpret the Restrictions and Reservations consistently with the public policy to preserve natural, scenic, and open conditions and agricultural, farming, forest and open space use." (A.G. Br., 12-13). *NPC* does not support the plaintiffs' interpretation, but in fact supports that of the defendant.

At issue in *NPC* was the validity of an easement over the defendants' driveway. This driveway provided access to a parking area behind the buildings.[9] In *NPC*, the plaintiff, who owned one building, brought an action against the owners of a neighboring building claiming a right of access to the driveway that separated the two buildings. The trial court found in favor of the defendants and the Appellate Court affirmed the judgment of the trial court quieting title to the driveway in favor of the defendants and terminating the easement. The Supreme Court reversed the Appellate Court and remanded the matter for a new trial. *NPC* is distinguishable because it addressed the *validity* of an easement by interpreting an *ambiguous* phrase. Here, the validity of the declaration is not the issue and the trial court concluded that the Declaration was unambiguous.

While *NPC* is factually distinguishable, to the extent that it is relevant, *NPC* supports the defendant's interpretation of the Declaration. *NPC* stands for the broad proposition that servitudes should be enforced reasonably and as they are written. Like the plaintiff in *NPC*, the defendant here is seeking a reasonable interpretation of the Declaration as written, one that allows her to use her property in a reasonable fashion consistent with the document.

In *NPC*, the Court determined that the easement was valid by interpreting the phrase "professional offices." The Court concluded that "professional offices" was ambiguous. 320 Conn. at 525. It posited a narrow definition and another, broader definition. Because there was

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[9]The specific language of the easement stated, "the first Parties grant to the Second Parties and unto the survivor of them, and unto such survivor's heirs and assigns forever the right (in common with the First Parties' heirs and assigns) to pass and re-pass by vehicle or on foot over the entire length of said driveway running from South Main Street to the garages on the First Parties' premises, except that, in the event that [192 South Main Street] shall be used for purposes other than residential or professional offices, the Second Parties' right to use the said driveway shall terminate." *NPC*, 320 Conn. at 522.

no definition of "professional offices" in the agreement, the Court chose the broader definition in order to ensure the validity of the easement and to further the goals enumerated above. To be clear, however, if the agreement had defined "professional offices" narrowly, the Court would have been constrained by the plain language of the document. The trial court in this case erred in not constraining itself to the plain language of the document.

If the policy considerations of *NPC* are pertinent to this case, the trial court's decision cannot stand. Instead of finding that the easement was not valid, thereby destroying the value of the plaintiff's property, the *NPC* Court balanced the burden of the easement against the public interest in the use of land. With a valid easement, both the defendant and the plaintiff were able to enjoy the use of the land and its associated benefits. Interpreting the Declaration as it did in this case, the trial court ignored the defendant's interest in the use of her land in favor of what it perceived as the social utility of environmental conservation.

NPC focused on "safeguarding the public interest in maintaining the social utility of land while minimizing legal disruption of private transactions." Id. at 527. As to the social utility of land, the *NPC* Court concluded that a reasonable interpretation of the agreement required that the easement be maintained, allowing both owners to continue to utilize their respective buildings. The social utility of the land is furthered when all parties are able to enjoy the use of the land as they expected when they purchased the property. The trial court's interpretation of the Declaration in this case is akin to terminating the easement in *NPC*. It restricts the defendant from reasonably using her property consistent with the plain language of the Declaration, and it grants the plaintiffs rights not contained in the Declaration.

The trial court could not change the plain language of the Declaration, nor should the plaintiffs' rights be expanded beyond what the Declaration provides. The trial court's interpretation necessarily reduces the value of the defendant's property. Finally, the defendant's interpretation, that the document means expressly what it says, minimizes legal disruption. To

allow additional rights not expressed in the Declaration is to encourage continuing fights between the plaintiffs and defendant over her rights to the property. This decision runs afoul of *NPC*.

One final note on *NPC*: as there is no question about whether the declaration is valid, the cases cited in the defendant's main brief remain applicable. They stand for the proposition that prohibitions must be expressly stated and will not be implied absent a finding that the covenant is ambiguous. *Katsoff v. Lucertini*, 141 Conn. 74, 77-78 (1954); *Pulver v. Mascolo*, 155 Conn. 644, 648-49 (1967); *5011 Cmty. Org. v. Harris*, 16 Conn. App. 537, 541 (1988). These cases are consistent with *NPC* as easements or reservations must be given a reasonable reading in order to assure that both parties are able to enjoy their property. Where the restrictions expressly limit conduct, such as the building of multiple outbuildings, the court will enforce the restriction as written. But as the Court held in *Morganbesser v. Aquarion Water Co. of Connecticut*, 276 Conn. 825, 829 (2006), even though a use might advance a public policy, it "does not permit this court to ignore the clear and unambiguous language of the restrictive covenant prohibiting such a use." Id. at 832. In this case, the trial court was bound by the language of the Declaration.

E. If the language is ambiguous, the case must be remanded.

The Land Trust cites to testimony by Mr. Selden to show the meaning of the Declaration. (L.T. Br., 3-4). But the trial court made no determination of the intent of the parties, and indeed limited testimony thereto, because it found the Declaration unambiguous. If the Declaration is ambiguous, as discussed in defendant's original brief at page 22, the matter should be remanded. *Isham v. Isham*, 292 Conn. 170, 185 (2009) (remanding case for determination of parties' intent where contract held ambiguous).

II. THE RESTORATION PLAN WAS IMPROPER.

First, the defendant never agreed that a certain restoration plan should be used. The defendant was ordered to file a restoration plan by the trial court and did so, without waiving any rights to contest the orders. (Pl. App., A192; Def. App., A141, A186).

Second, as to the sufficiency of the evidence, the Land Trust claims that the aerial photo was sufficient to show the condition of the property, (L.T. Br., 9, 10 n.8), but concedes later in its brief that it was "infeasible to determine *exactly* what grasses and forbs populated the field . . . ." (L.T. Br., 28) (emphasis in original).[10] Yet, the trial court ordered specific grasses, in keeping with the wishes of the Land Trust. (Pl. App., A179, A188; Def. App., A186). If there was no detailed proof of specific species, there was insufficient evidence to order specific species. The plan cannot be supported by the admitted failure of proof as to the condition of the property when it was purchased.

Third, both the trial court and the Land Trust read "natural" as "native." The Land Trust repeatedly refers to the need for "species diversification" and native versus non-native. (L.T. Br., 29 (citing to Pl. App., A427-28)). There is *nothing* in the Declaration which requires that the trees, shrubs, crops, hay grass, or any other such "natural" flora be native. The clear language of the Declaration would allow the cultivation of palm trees or cacti, the grazing of buffalo, or the planting of banana trees. (Def. App., A215). Moreover, there is nothing precluding the defendant from growing a lawn of grasses of her choosing. A lawn is scenic and open, even if the Land Trust does not perceive it as natural. This is once again the Land Trust trying to rewrite a clear and unambiguous Declaration to include a new and unexpressed term. And this is what the trial court adopted when it held that the grasses and plants, which no one can say are not natural, currently on the 14 acres of Restricted land, must be removed or altered to make way for grasses and plants chosen by the Land Trust. What is there is natural, it simply is not what the Land Trust wants to be there.

Fourth, there is no basis to limit mowing on the Restricted Areas. It is *expressly* permitted by the Declaration. Under any interpretation of the Declaration, there is no basis for the trial court to dictate mowing schedules. The Land Trust knows this, having sought additional

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[10]In fact, the Land Trust cites to Lawrence's testimony (Pl. App., A248, lines 11-12) stating the photo was taken in the winter. Obviously, winter is not May, 2007.

agreements from prior owners to curtail mowing. But the Declaration, the only document binding on the defendant, allows her to mow as she wishes and where she wishes, including in the woodland. A limitation on mowing is an additional, unwarranted limitation on the defendant's property rights, one which the trial court had no authority to order.

The Land Trust's position is inconsistent. On the one hand, the Land Trust asks for mowing to be curtailed so that the property may return to its "natural state," (L.T. Br., 3, 27), i.e., to its "natural wilderness," (L.T. Br., 17, 19, 30). On the other hand, the Land Trust unequivocally states that, to maintain the field, it "should be mowed once or twice a year as both parties' experts recognized," because "[u]nless mowed periodically, fields eventually revert to forests." (L.T. Br., 25 n.25). So the natural state of these 14 acres is forest. But 14 acres of forest would not be open. The Land Trust's arguments show that the property cannot be kept in a "natural, scenic *and* open" state. Fortunately, the Declaration makes clear that the property must be "natural, scenic *or* open." The latter permits the conduct which the Land Trust complained of and which the trial court condemned. The decision cannot stand.

III. THE TRIAL COURT'S AWARD OF CERTAIN ATTORNEY'S FEES WAS IMPROPER.[11]

First, the Land Trust claims that this issue is subject to abuse of discretion review. This would be true if the dispute were whether the attorney's fees were reasonable. But at issue is the legal question of whether the Land Trust can be awarded legal fees for a withdrawn action and for a failed administrative proceeding which was ancillary and nonessential to this action. Such a legal issue is subject to plenary review as noted in the appellant's original brief.

The Land Trust relies on a broad and unfounded reading of Section 3.6 in the Declaration. Section 3.6 provides, "If any action, whether at law or in equity, shall be brought to enforce the covenant arising pursuant to this declaration or to prevent an anticipatory breach thereof, and if *any relief is granted in favor of the plaintiff* in *said action* the defendant . . . shall be obliged to

[11]The Attorney General did not brief this issue and therefore has waived the right to argue as to the issue. *Czarnecki v. Plastics Liquidating Co.*, 179 Conn. 261, 262 n.1 (1979).

pay all court costs and the reasonable attorney's fees . . . ." (Def. App., A216) (emphasis added). The highlighted language shows that Section 3.6 provides no basis for an award of the attorney's fees at issue in this appeal.

First, "said" has a clear and definite meaning. Black's Law Dictionary, 10th Ed, 2014, defines "said" as "aforesaid" or "above-mentioned." The reference is to the thing previously cited. Id. In this case, "said action" is the action brought to enforce the covenant. The declaratory judgment action and Inland Wetlands proceeding were different proceedings. Thus, attorney's fees may be awarded only for the action brought to enforce the covenant, which alone resulted in relief granted to the Land Trust.

Second, neither the declaratory judgment action nor the Inland Wetland proceeding resulted in "any relief . . . granted in favor of the plaintiff." While the declaratory judgment action could have been considered an action to enforce the covenant, the Land Trust chose to abandon it. In doing so, it abandoned its claims for relief, and therefore it abandoned its claim for attorney's fees for *that* action. The fact that the Land Trust chose to amend its complaint to remove the declaratory action and add the claim it intended to pursue does not negate its abandonment. Having failed to pursue that action, there was no relief granted. It was improper to award fees for that withdrawn and abandoned claim. The Land Trust cites to no case for its claim that, because the declaratory ruling action and the current complaint are nearly identical, they "are one and the same action" and therefore the fee award is proper. That is not the law. The Land Trust ignores *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 517 n.38 (1995), *Vandersluis v. Weil*, 176 Conn. 353, 359 (1978), and *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72, 93 (2005). Those cases allow recovery of attorney's fees to recover the expenses of bringing the legal suit, but do not include expenses from "any former trial."

As to the proceedings before the Inland Wetlands Commission, that matter was resolved in favor of the Platners. The Land Trust pursued administrative remedies before the Commission and *lost*, a point it does not dispute. (L.T. Br., 34). Now the Land Trust claims that, since it

prevailed on the driveway issue in this action,[12] it is entitled to attorney's fees for the prior unsuccessful action. Again, it cites no legal support for that claim. One action had nothing to do with the other action, legally speaking. Not only was the Inland Wetlands proceeding not tied to this "said" action, but no relief was granted. It was improper to award fees for that prior unsuccessful action.

Finally, the Land Trust relies upon General Statutes § 52-560a(c) for the award of attorney's fees, claiming that the statute "provides that a court may award attorney's fees as damages for the encroachment onto conservation land." (L.T. Br., 33). Yet, that is not what the statute provides. The statute permits the holder of a conservation easement to "bring an action *in the superior court* . . . against any person who violates the provisions . . . ." General Statutes § 52-560a(c) (emphasis added). The statute then provides that if the court finds that any person violated the easement, the court may order remedies, including "reasonable attorney's fees and costs and such injunctive or equitable relief as the court deems appropriate." Id. The award of attorney's fees under § 52-560a(c) is tied to the action brought to enforce the easement in the superior court. It provides no basis for the award of fees for administrative actions taken by the easement holder, nor for any other proceedings the holder opts to commence in lieu of a claim under § 52-560a(c). Moreover, it does not apply to actions brought but which end without a finding that there was a violation of the easement. The declaratory judgment action and the Inland Wetlands matter resulted in no judgment, no finding, and therefore cannot support an award of attorney's fees under § 52-560a(c).

IV. THE TRIAL COURT'S AWARD OF DAMAGES WAS IMPROPER.[13]

In its brief, the Land Trust explains the damages award in the same way the appellant does: the court reached $350,000 in damages by applying a multiplier of 3.5 to Glenn Dreyer's testimony that the restoration would cost between $90,000 and $100,000. (L.T. Br., 30-31). The

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[12]The issue of the driveway has been resolved by stipulation. (Def. App., A191).

[13]The Attorney General did not brief this issue and therefore has waived the right to argue as to the issue. *Czarnecki*, supra.

argument ignores the 800-pound gorilla in the room: the trial court expressly rejected both of Mr. Dreyer's more intensive, environmentally damaging restoration plans. Logically therefore, his testimony as to the cost of that restoration could not properly be the basis for damages. See *Bhatia v. Debek*, 287 Conn. 397, 419 (2008).

The statute allows a trial court to "award damages of up to five times *the cost of restoration* or statutory damages of up to five thousand dollars." General Statutes § 52-560a(d) (emphasis added). The statute does not provide that damages may be based on any proposed restoration, but that it be based on "the costs of restoration." A plain reading of the language makes it clear that it must be the cost of the restoration that is actually ordered by the court. To read the statute otherwise would lead to absurd results. A party could put on evidence of a plan that cost millions of dollars simply to provide a basis for the damages award, even though the proposed plan is impractical and ridiculous. Statutes cannot be interpreted so as to allow for absurd results. *Wilkins v. Connecticut Childbirth & Women's Ctr.*, 314 Conn. 709, 723 (2014).

The Land Trust agrees with the defendant that there is *no* evidence as to the cost of the plan ordered by the trial court. (L.T. Br., 31). It has, therefore, conceded that the trial court had no basis for the award of damages. It then argues that it was the defendant's burden to show how much the damages award should be. There are two stunningly obvious flaws with this argument. First, the Land Trust, as the plaintiff, had the burden to prove its case, including the burden to prove the amount of damages.

> The [plaintiff has] the burden of proving the nature and extent of the loss . . . . Proof of damages should be established with reasonable certainty and not speculatively and problematically. . . . Damages may not be calculated based on a contingency or conjecture."

Carrano v. Yale-New Haven Hosp., 279 Conn. 622, 650 (2006) (citation omitted; internal quotation marks omitted). The defendant had no burden of proof on the issue of damages.

Second, the law relied on by the Land Trust applies to claims which could have been raised at trial and were not. (L.T. Br., 31). The damages award was determined by the trial

court as part of its judgment. The defendant moved to reargue the damages award and then appealed and briefed the issue. The Land Trust has conceded that the only logical basis for the damages award was the rejected restoration plan. The issue has been properly preserved and raised.

The Land Trust requests that if the damages award cannot stand that the matter be remanded so that the trial court could hear evidence on the actual costs of restoration. The Land Trust had the opportunity and failed to present evidence as to the cost of the proposed plans. Unsurprisingly, the trial court did not make a determination of the cost of the remediation plan it ultimately ordered. Having failed to present its case the Land Trust should not be given a second bite at the apple. *Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1324 (Fed. Cir. 2008).

Finally, the Land Trust fails wholly to discuss or explain the trial court's order that, no matter what the actual cost is, the damages should be $350,000. There is no legal basis for such an order. The award of damages cannot stand.

CONCLUSION

The trial court and the plaintiffs are mistaken in their interpretation of the Declaration at issue. The agreement must be construed as a whole, with a presumption against ineffectiveness and as a harmonious document. When analyzed according to these canons, it is clear that the Reservations are the controlling provisions of the document. Those Reservations permit the defendant's conduct. The trial court, therefore, abused its discretion and the case should be reversed in favor of the defendant.

DEFENDANT
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CERTIFICATION

Pursuant to Practice Book § 67-2(h), I hereby certify that: (1) the electronically submitted brief and appendices were emailed on September 21, 2016, to counsel of record listed below; and (2) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendices were mailed, postage prepaid, to **The Honorable Joseph Q. Koletsky**, and the counsel of record listed below on September 21, 2016; (2) that the brief and appendices are true copies of the brief and appendices filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

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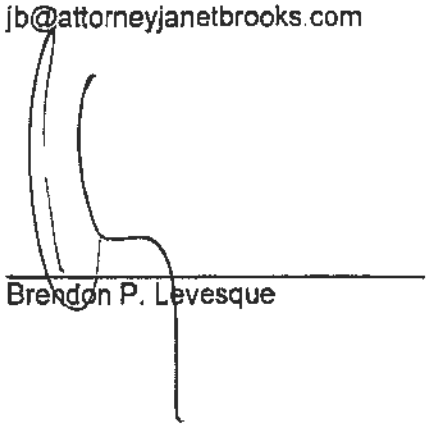

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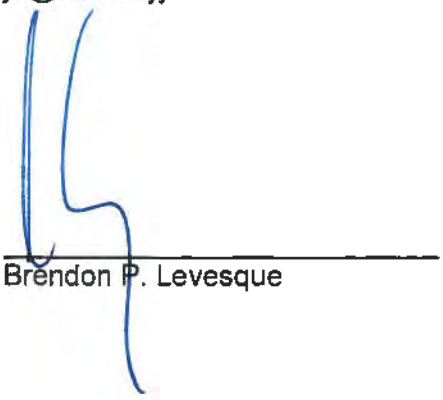

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